



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NIGI WAKUMKUTU WILLIAMS,
Petitioner,
v.
L.E. SCRIBNER, Warden,
Respondent.

NO. CV 07-2694-R (AGR)

ORDER ADOPTING
MAGISTRATE JUDGE'S FINAL
REPORT AND
RECOMMENDATION

Pursuant 28 U.S.C. § 636, the Court has reviewed the entire file *de novo*, including the Petition, the Magistrate Judge's Final Report and Recommendation, and all records in the file. Having made a *de novo* determination, the Court agrees with the recommendation of the Magistrate Judge and adopts the Magistrate Judge's Final Report and Recommendation.

The Magistrate Judge issued her Final Report and Recommendation before the Ninth Circuit's opinion in *Butler v. Curry*, Case No. 07-56204, 2008 WL 2331440 (9th Cir. June 9, 2008). In *Butler*, the court found that the use of probationary status as a basis for imposing an upper term sentence does not fall within the "prior conviction" exception. *Id.* at *17. However, the use of probationary status in Petitioner's case was harmless. *See id.* at *18 (a petitioner "is entitled to relief only if the sentencing error in his case is not harmless").

1 "[T]he relevant question is not what the trial court *would* have done, but what it
2 legally *could* have done." *Id.* at *19 (emphases in original).

3 Unlike in *Butler*, Petitioner's probation report was lodged with the Clerk's
4 Transcript so the Court can know what evidence was submitted in the state court.
5 (Lodged Document ("LD") 1 at 33-48); see *Butler*, 2008 WL 2331440 at *21 ("we
6 have not found a probation report or any other document that reflects Butler's
7 probationary status at the time of the crime"). The date of the current offense
8 was July 19, 2004. (LD 1 at 33.) The probation report indicates that Petitioner
9 was on summary probation at the time of the current offense, and that his
10 discharge from parole was not scheduled until December 22, 2006. (*Id.* at 33.)
11 The report also indicates that Petitioner was convicted on October 7, 2002, of
12 burglary and sentenced to two years in prison. (*Id.* at 39.) The burglary
13 conviction was in the case (No. TA066801) referred to by the trial judge when he
14 imposed the upper term. (*Id.*; LD 2 at 3362-63.) Therefore, any error in using
15 Petitioner's probationary status to impose the upper term was harmless because
16 had the evidence in the probation report been presented to the jury, it would more
17 likely have found Petitioner's probationary status proved beyond a reasonable
18 doubt. See *Butler*, 2008 WL 2331440 at *21.

19 The Court also notes that the trial judge could have constitutionally
20 imposed an upper term solely on the basis of Petitioner's prior conviction, which
21 was admitted by Petitioner before trial began. (LD 2 at 11-12); see *Cunningham*
22 *v. California*, 549 U.S. 270, 127 S. Ct. 856, 860, 166 L. Ed. 2d 856 (2007) (A
23 judge cannot "impose a sentence above the statutory maximum based on a fact,
24 other than a prior conviction, not found by a jury or admitted by the defendant.")
25 (citations omitted).

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1 In Petitioner's objections filed on April 25, 2008 ("April Objections"),¹ he
 2 raises a new, unexhausted ground not set forth in his original petition.² The Court
 3 will not consider it. See *Greenhow v. Secretary of Health & Human Servs.*, 863
 4 F.2d 633, 638 (9th Cir. 1988) ("[A]llowing parties to litigate fully their case before
 5 the magistrate and, if unsuccessful, to change their strategy and present a
 6 different theory to the district court would frustrate the purpose of the Magistrates
 7 Act."), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347,
 8 1348 (9th Cir. 1992) (en banc) (per curiam), *cert. denied*, 507 U.S. 978 (1993);
 9 see also *Cacoperdo v. Demosthenes*, 37 F.3d 504, 507 (9th Cir. 1994) ("A
 10 Traverse is not the proper pleading to raise additional grounds for relief."), *cert.*
 11 *denied*, 514 U.S. 1026 (1995).

12 Petitioner's request for a stay while he exhausts this new ground is denied
 13 as he has failed to meet the requirements in *Rhines*. See *Rhines v. Weber*, 544
 14 U.S. 269, 277-78, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005) (To obtain a stay,
 15 Petitioner must show that he has good cause for his failure to exhaust his claims
 16 first in the California Supreme Court, that his unexhausted claims are "potentially
 17 meritorious," and that he has not engaged in "intentionally dilatory litigation
 18 tactics.").

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23 ¹ These are the objections filed in response to the initial Report and
 24 Recommendation filed on March 5, 2008. Petitioner did not file objections to the
 Final Report and Recommendation.

25 ² Ground Three of the petition raises the applicability of Cal. Penal Code §
 26 654 to the 8-month consecutive sentence the trial court imposed for Petitioner's
 27 possession of a firearm. (Petition at 6.) The new ground is based on the
 28 applicability of Cal. Penal Code §§ 654 and 1170(b) to "other sentencing
 measures used to bolster his sentence unlawfully." (April Objections at 5.)
 Petitioner admits the new ground is unexhausted and that he has a habeas
 petition currently pending in California that raises this ground. (*Id.* at 5-6.)

1 IT IS ORDERED that Judgment be entered denying the Petition and
2 dismissing this action with prejudice.

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4 DATED: June 30, 2008


MANUEL L. REAL
United States District Judge